No. 2599

United States
Circuit Court of Appeals

For the Ninth Circuit

COAST SHIPPING COMPANY, a Corporation, Claimant of the Schooner "OCEANIA VANCE," Her Tackle, Apparel and Furniture,

Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a Corporation,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief for Appellant

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STATEMENT OF THE CASE.

This is a case of libel for collision brought by the Puget Sound Tug Boat Company, a corporation,

libelant and appellee, against the schooner "Oceania Vance," her tackle, etc., claiming damages for the loss of the steam tug "Sea Lion" through collision with the Vance. The Coast Shipping Company, corporation, as claimant to the schooner, contested the libel and judgment was rendered by the United States District Court for the Western District of Washington, Northern Division, in favor of appellee and against the claimant and its bondsman in the amount of the bond, towit, the sum of $5000.00. From this judgment an appeal is prosecuted by the claimant.

THE PLEADINGS.

The libel in substance alleges: Incorporation of the libelant and its ownership of the tug "Sea Lion," which is described, and that it was of the value of $31,000; and it is alleged that the "Oceania Vance," whose description is given, is reputed to be owned by the Coast Shipping Company and that it was of the value of $6,000. (Rec., p. 4.)

The third paragraph is as follows:

III.

That on the morning of the 9th day of June, 1909, the said tug "Sea Lion" was bound from Waldron Island in the district aforesaid, to Grays Harbor in

the district aforesaid, having in tow the barge "Charger" loaded with rock, and was proceeding on her regular and usual course from said Waldron Island towards the Straits of Juan de Fuca. That on the morning of the said 9th day of June, 1909, the said schooner "Oceania Vance" was proceeding up the Straits of Juan de Fuca, in ballast under sail. That about 6:40 o'clock A. M. of said 9th day of June, 1909, the weather being thick and foggy, but a fresh breeze blowing up the Straits of Juan de Fuca, being a fair wind for the said schooner "Oceanica Vance," the officers and men in charge of the navigation of the said tug "Sea Lion" heard three blasts of a fog-horn ahead, and thereupon the engines of said tug were immediately slowed down and said tug's headway decreased and a few moments thereafter upon hearing the second signal from a sailing vessel approaching [5] with a fair wind, to-wit, three blasts on a fog-horn, the engines of said tug were reversed, and while the headway of said tug was gone, the said schooner "Oceania Vance," approaching said tug with great speed and with all sails set, ran into, collided with, and sank the said tug "Sea Lion" so that she became and is a total loss, with the loss of all of the personal effects of the officers and crew thereof. That said collision occurred about four miles east by north of Race Rocks near the port of Victoria at the time afore-

said, and that at the time of and preceding said collision the said "Oceania Vance" was proceeding at a rate of speed in excess of seven knots per hour, and had all of her canvas set and drawing was out of the usual and ordinary course of vessels coming up the Straits of Juan de Fuca with a fair wind such as was blowing at said time. That said schooner, in order to make greater speed under her rig, instead of running straight up the Straits of Juan de Fuca with a fair wind, was tacking back and forth across said Straits with a fair wind so as to utilize the full speed of all of her canvas and was proceeding at an unlawful and immoderate rate of speed for the thick foggy weather then prevailing. That during all of the time up to and prior to said collision, said tug-boat was in all respects well manned, tackled, appareled and appointed, and had the usual and necessary complement of officers and crew, and the master and crew engaged on board were on the lookout for the protection and safety of said vessel and of her said tow and were constantly and regularly sounding upon her steam whistle the proper signals at the proper times, and proceeding at a moderate rate of speed, indicating that she was a tug vessel having a tow, and said [6] collision was caused without any fault or negligence on the part of the said tug "Sea Lion," or of any of her officers or crew.

(Rec., pp. 5, 6.)

In the fourth paragraph it is alleged that the collision was caused solely by the excessive speed of the "Oceania Vance" and that by the collision the tug "Sea Lion," her boilers, etc., were a total loss. (Rec., pp. 6, 7.)

The fifth paragraph alleges the damage sustained in the sum of $31,000, and the sixth paragraph alleges that the "Oceania Vance" is within the jurisdiction of the court. (Rec., pp. 7, 8.)

This libel was filed in the court below on August 7, 1909 (Rec., p. 9), and an attachment against the schooner "Oceania Vance" was issued on that day (Rec., pp. 13, 14), and on that day the schooner was seized by the marshal. (Rec., p. 15.) On August 12, 1909, claim was made on behalf of the Coast Shipping Company, owner of the schooner. (Rec., pp. 16, 17.)

On August 27, 1909, by stipulation of the parties, it was agreed that said schooner might be released on the execution of a bond by claimant in the sum of $5000.00 (Rec., p. 22) and on the same day the bond was given and the vessel released. (Rec., pp. 22, 23.)

On March 28, 1910, the answer of claimant was filed. (Rec., pp. 24-29.) The first and third articles

of the libel were denied for want of knowledge of the truth thereof, and in the third and fourth paragraphs (Rec., pp. 25-7) it is alleged:

III.

That on the morning of the said 9th day of June, 1909, the said schooner "Oceania Vance" was proceeding up the Straits of Juan de Fuca in ballast under sail; that at said time she was properly manned and equipped, and had a full complement of officers and seamen aboard, and the vessel was running before the wind and steering straight course for Point Wilson; that at the said time the said "Oceania Vance" was making about five and one-half knots an hour; that about 6:40 o'clock A. M. of said 9th day of June, 1909, the weather being thick and foggy, and a strong wind blowing up the Straits of said Juan de Fuca, it was difficult to navigate the said schooner "Oceania Vance," and the mechanical fog-horn of the said "Oceania Vance" was being blown at the intervals required by law, suddenly the loom of a vessel was seen about ——— points on the schooner's port-bow, and almost immediately afterwards there came in sight the tug "Sea Lion," sailing free on a course of about ——— and moving through the water at the rate of about seven knots. That immediately thereafter the schooner endeavored to steer so as to get out of the way of the said

"Sea Lion"; that the said "Sea Lion" first reversed its engines and then started to go ahead again and that the said tug "Sea Lion" thereupon ran into, collided with and stuck the said "Oceania Vance" in the stern about the thirteen foot mark. That the said "Oceania Vance" at said time was steering a straigth course for Point Wilson, and had sounded fog-signals for a long time prior thereto, and in every way complied with the rules of the road; [26] that when the said "Oceania Vance" and its officers heard the whistle of the said tug "Sea Lion" they did their utmost to steer clear of anything coming near it, and had swung quite a little bit, when the said "Sea Lion" crashed into the said "Oceania Vance." That the said schooner "Oceania Vance" was proceeding on her usual and regular course, and that the said tug "Sea Lion" was proceeding at an unlawful and immoderate rate of speed for a steam vessel in such thick and foggy weather as then prevailed. That the said collision was in no wise caused by any fault or negligence on the part of the said schooner "Oceania Vance" or any of her officers or crew, and was caused entirely by the fault and negligence and carelessness of the said tug "Sea Lion," her officers and crew.

IV.

That the said collision was caused solely by the

said tug "Sea Lion" starting her engines and going ahead after having stopped the same. That had the said tug "Sea Lion" stopped her engines and then backed there would have been no collision and that said collision was caused solely because the officers of the said tug "Sea Lion" so carelessly and negligently operated the said "Sea Lion" and her engines that it was impossible for the said "Oceania Vance," her officers and crew, to avoid being struck by the said tug "Sea Lion," and that said collision and the damages resulting therefrom was caused solely by the fault and negligence of said tug "Sea Lion," her officers and crew.

The cause was referred to a commissioner to take and report the testimony of the respective parties (Rec., pp. 29, 30), and upon the pleadings and testimony taken the cause was submitted to the court below and determined by it in favor of appellee, the court awarding to appellee judgment against appellant and its bondsman in the sum of $5000 and costs (Rec., pp. 170-172), from which decree this appeal was taken.

SPECIFICATION OF ERRORS.

The claimant, Coast Shipping Company, appellant herein, assign for error in the findings, conclusions and decree of the district court in this cause, that the learned judge thereof erred as follows:

1. * * *

2. In finding and deciding that upon hearing the signal of the "Oceania Vance" just prior to the collision, the "Sea Lion" stopped its engines and blow its tow signal.

3. In holding and deciding that the "Sea Lion" stopped its engines as soon as those on board the "Sea Lion" heard the "Oceania Vance" give its signal.

4. In holding and deciding that at the time the captain of the tug "Sea Lion" gave the signals to stop, to back, to go ahead, he called to the lookout on the "Oceania Vance" to put the wheel of the schooner over.

5. In holding and finding that good seamanship required that the wheel of the schooner be put over.

6. In holding and deciding that the "Oceania Vance" at the time of the collision, was going at a speed to exceed seven miles an hour.

7. * * *

8. * * *

9. * * *

10. In holding and finding that the acts of the officers of the "Sea Lion" at and about the time of

the collision were acts *in extremis* and not imputable to them as a fault.

11. In failing to hold and find that said tug was in fault in failing, when it started to back, to give the proper signal to show that it was backing.

12. In failing to hold and find that said tug was negligent in that when it stopped it was then backed and then started forward, the course of the schooner not having been changed.

13. In failing to find that the tug was at fault in that it violated Article XVI of the International Rules to Prevent Collisions, contained in the Act of August 19, 1890, in that said tug did not, upon hearing apparently forward of her beam, the fog signal of the "Oceania Vance," the position of which was not ascertained, stop her engines and then navigate with caution until danger of the collision was over.

14. In entering final decree of November 4th, 1914, in favor of libelant and against claimant and its said bondsmen; and

(a) In entering judgment against claimant and the Fidelity and Deposit Company of Maryland in the sum of $5000.00 with interest; and

(b) In entering judgment against claimant and F. A. Bartlett and H. M. Thornton for respondent's

costs and disbursements in the sum of One Hundred Seventy-nine and 99/100 Dollars ($179.99).

15. In refusing to enter judgment in favor of the claimant and against libelant dismissing the libel of libelant and for costs against libelant and in favor of claimant.

ARGUMENT.

We will group these assignments for the purpose of argument under five points, as follows:

1. The speed of the "Oceania Vance" was not excessive.

2. The schooner was not improperly navigated and particularly there was no negligence in failing to put the wheel over just prior to the collision.

3. The tug was at fault in that the engines were not stopped immediately upon first hearing the fog signals of the Vance apparently forward of the beam, the position of the schooner not being then known by those on board the tug.

4. The tug was negligent on starting back in failing to signal that manoeuver for the information of those in charge of the schooner.

5. The tug was at fault in that when the engines were stopped they were reversed for a time and then started ahead at full speed.

I.

The speed of the "Oceania Vance" was not excessive.

This point requires a consideration of two questions: (a) the actual speed of the vessel; and (b) whether that speed was in fact excessive. The first is a question of fact. The second is a matter of inference.

(a) The actual speed of the vessel cannot, of course, definitely be known. The estimates thereof are those of the witnesses for libelant who were aboard the tug and those of the witnesses for the claimant who were on board the schooner. Those on board the tug saw the schooner for a very brief space of time, and while it was covering a distance from 60 feet to 40 fathoms (240 feet). (Rec., pp. 36, 60, 88, 97, 106.) Some of these witnesses based their estimate upon the speed made by the Vance after the crew of the tug were taken on board, and some upon statements which they say were made by the captain or mate of the Vance at that time. Typical of the testimony above mentioned is that of Captain Lovejoy, who testified (Rec. 41) that 15 or 20 minutes after leaving the scene of the collision the Vance ran about 3½ knots during the first half hour, as shown by the patent log. Captain Stream, however, who was first mate on the tug, estimated

such speed as four or five knots per hour (Rec., p. 91) and stated that the captain of the schooner stated that just before the collision they were making three and a half or four knots per hour. The captain of the Vance testified (Rec., p. 158) that the patent log "is not reliable and it was over-running, and I just used it only as a check; I was not using it to run distances with whatever."

There is no other basis for the decision of the lower court that the Vance was running in excess of seven miles per hour except the testimony of the man at the wheel of the tug (Rec., p. 108) that judging from the breeze and the sails set and that the Vance was in ballast, he estimated the speed at seven or eight knots per hour. He testified, however (Rec., p. 107), "the mate gave a signal to the engineer, but I do not know about that; I was hauling the wheel over." And elsewhere in his testimony are suggestions from which it is fair to assume that he was occupied with his duties at the time and had little opportunity to pay attention to the speed of the schooner. In any case, it would have been very difficult for any one on board the tug to estimate the speed of the schooner approaching directly upon them and in the limited time during which it was visible. In its opinion the lower court states that in a former hearing the captain immediately after the collision testified that the schooner was

"going at a speed of six and one-half or seven knots an hour, and he had concluded this after an examination of the log * * * " (Rec., p. 163.) Captain Scott did make that statement a few days after the collision, but he explains (Rec., p. 152) that at that time he had not figured up his distance; that he had been too busy; also that "I don't know what she logged, because the log was unreliable and I would use it only in case I wanted to in short tacks." (Rec., p. 151.)

The distance from Cape Flattery to the place of collision is a little under fifty miles. (Rec., p. 142.) The schooner passed Cape Flattery the evening before the collision at a time variously estimated at 8.30 p. m. (Rec., p. 126) and 8 p. m. Rec., p. 142.) The collision occurred between 6 and 7 a. m. The only witness who fixes the exact time is Christian Anderson, one of the witnesses for libelant, who was at the wheel of the tug at the time of the collision and who, as he left the wheelhouse, observed that it was twenty minutes to seven. (Rec., p. 105.) Since all the witnesses testify that the tug sank within two or three minutes after the collision, the time is very definitely fixed by this witness and it is apparent that the Vance had taken approximately ten hours to go a distance under fifty miles. This circumstance corroborates the testimony of the mate of the

schooner (Rec., pp. 127, 133, 134) that at the time of the collision the Vance was making about five knots and had been throughout the night, and of like testimony given by the captain of the Vance. (Rec., p 142.)

Something is said in the testimony concerning the sail carried by the Vance. The captain of the tug states that the Vance had up "all her lower sails and the mizzen gaff topsail," and that they were full and drawing. Smith, chief engineer of the tug, states that all the schooner's lower sails were set. He did not notice the topsail. Stream, first mate on the tug, states that all sails were set except the fore and main topsails (Rec., p. 96) and the halliards were let go. (Rec., p. 88.) Anderson, at the wheel of the tug, states that the Vance had all sails set except the fore topsail. (Rec., p. 108.)

On the other hand, Williams, the mate of the schooner, states that all the topsails were down (Rec., pp. 126, 127) and but one sail was drawing. The captain of the schooner states (Rec., pp. 156-157) that at the time of the collision he had up the courses, foresails, jib and spanker topsail; that some sails had been taken in before the collision and that the mizzen topsail was set, though whether that sail was taken in before the collision is not clear.

The wind is described by the various witnesses as a "fresh breeze" and the schooner was in ballast. What the condition of the tide was is not disclosed, and while it appears that the particular neighborhood of the collision is one where the currents were strong and there were many tide rips (Rec., p. 120), so that a tug with tow could not keep its course without traveling at least four or five knots per hour (Rec., p. 121), it is not shown how the schooner would be affected in her course by such tidal conditions, either as it might affect her speed or would render it necessary that she make a given speed in order to hold her course.

We have endeavored in what has gone before to summarize all the material testimony upon the subject of the speed of the Vance, and from it all there is nothing conclusive as to her speed except the distance which she traversed of less than fifty miles in about ten hours. This would make her average speed under five miles per hour. It would seem, therefore, that the lower court erred in holding that she was sailing in excess of seven miles per hour.

(b) There is no testimony from which it may be concluded that the speed of the schooner was in any event excessive. To form a conclusion upon that point it would be necessary to know and understand all the elements entering into the question. As we

have said, the location was one of strong currents and of many tide rips. The vessel was rather close to the land. Whether the schooner could safely have been navigated at a slower gait is not shown. Since the burden is upon the libelant to establish a negligent rate of speed, it would seem that that burden has not been sustained by it.

There are cases in which it has been held that a lesser rate of speed in foggy weather was negligent. Each case must, of course, depend upon its own separate facts. No court so far as we are aware has fixed any definite rate of speed as being excessive except in connection with special circumstances shown in such case. Those authorities, therefore, are of no value in determining the case at bar.

(See The Eagle Point, 114 Fed. 971.)

II.

The schooner was not improperly navigated, and particularly there was no negligence in failing to put the wheel over just prior to the collision.

It is claimed by the appellee and was held by the lower court that the schooner was in fault in that its wheel was not put over, which, it is said, good seamanship required.

This conclusion is based upon certain testimony set forth in the record and which will now be referred to.

Captain Lovejoy of the tug testified (Rec., p. 37) that after the engines of the tug had been reversed he (Captain Lovejoy) tried to clear the vessel by going ahead full speed, and he "hooked her on full speed ahead, and I motioned to the man on the lookout of the schooner to put his wheel over to clear us." What motion he made is not otherwise described, nor does it appear from the distance between the vessels, the situation of the captain of the tug or the situation of anyone on board the schooner that the motion could be seen, that it was necessarily understood, or that there was time in which to execute the manoeuver referred to. Captain Roos, a retired master mariner, in answer to hypothetical questions propounded by libelant, indicates that the wheel should be put hard over with a view to bringing the schooner into the wind. His testimony is not very definite, but so much can be inferred from it. (See Rec., pp. 111-118.)

The most definite testimony given on behalf of the libelant upon this point is that of Captain Stream, who was first mate of the tug at the time of the collision, and who has served on the Oceania Vance on one cruise since that time. (Rec., p. 97.)

As a witness for libellant, on cross-examination (Rec., p. 96), he testified:

Q. Well, now, what would the captain of the schooner have done with a vessel that close to each other and getting closer to each other every second, to have changed the results?

A. Well, I don't know what he could have done. I know what he could have tried to have done.

Q. What in your opinion would you have tried to have done?

A. Put my helm down and let her come into the wind, put all hands on the spanker-sheet so as to haul her around.

Q. How long would it have taken to have done that?

A. That would have taken some time; her sails are heavy sails.

On redirect examination (Rec., p. 98) he testified:

Q. And with her sails in that position, she would put her helm hard aport and that would bring her around with the wind as it was?

A. No. He would have to get her spanker in before she would have gone very far; after she got

around so far she would spill on the spanker, and the weight of the sails would have kept her there, but if he could have got the spanker in and sheeted home, as they call it, and let go of the head sails, she would have come around herself.

Q. Putting the wheel hard done?

A. Yes, sir; she would have come to a certain distance, but beyond that she would not have come with the sheets and sails in the position that they were.

Captain Scott of the schooner testified as follows:

Q. Well, when you saw this towboat, what did you do then?

A. I did nothing but keep on as I was going.

Q. Why?

A. Because there was nothing to do. I did not know what he was doing. According to the rule of the road I had to keep on.

Q. Do you know whether or not he reversed his engine?

A. I do not.

Q. You do not know that of your own knowledge?

A. That I only know by hearsay.

Q. Did the captain tell you he had reversed his engines?

A. Yes, he told be he had.

Q. Did he give any signals indicating that he had reversed his engines?

A. No.

Q. What would be the signal if he had reversed his engines?

A. Three short blasts of the whistle.

Q. If they had given any such signal what would you have done?

A. I would have endeavored to keep ahead of the towboat, and I would have endeavored to put my helm hard aport and tried to come around this way and get ahead of her; I would have known then that she was going astern.

Q. As far as you could judge, as far as you knew, she was coming on ahead?

A. I did not know what he was doing.

Article 20 of the International Rules for Avoiding Collisions (26 Stat. L. 327) provides:

When a steam vessel and a sailing vessel are proceeding in such directions as to involve the risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

Article 21 of the same rules (28 Stat. L. 83) provides:

Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

Article 28 (26 Stat. L. 328) provides that three short blasts of a whistle mean "my engines are going at full speed astern."

The situation which confronted those in charge of the schooner was that the tug became visible through the fog but a short distance away, a distance which must have been traversed in but a few seconds. The schooner's sails were on the port side, the wind blowing across the starboard quarter. The change in the course of the schooner would necessitate the putting of the wheel to port and the putting of all hands on the spanker-sheet to haul the vessel around, and that would have taken some time. Doubtless some change could have been made in her course merely by putting the wheel aport, but the vessel would not come about without the change in the position of her sails. Obviously, there was no time for the latter, and the former expedi-

ent might have been disastrous, since the change in the schooner's course would be calculated to nullify any action which the tug might take. The rules cited indicate that it was the duty of the sailing vessel to keep on her course and speed. That duty could be modified only by the appearance of circumstances indicating that such a course would be less safe than some other course. Captain Scott, of the schooner, in that portion of his evidence already quoted, said there was nothing for them to do because they did not know what the tug would do, and here we call attention to the fact that though the engines of the tug were reversed, that fact was not signalled by it to the schooner. We have already called attention to the rule that this fact should have been shown by three short blasts of the tug's whistle. It is not claimed by any person on the tug that this signal was given, though the engines were reversed, and the testimony of Williams, the mate on the schooner, also shows that no signal of any kind was given by the tug to indicate to those on the schooner whether she was going ahead or backing up. (Rec., p. 131.) Considering, then, that the intention of the tug was unknown to those aboard the schooner and that its manoeuvers were in no manner signalled to the schooner, and considering the very short time which elapsed between the time when the vessels came in sight of each

other and the time of the collision, it is obvious that the schooner could have adopted no other course than that prescribed by the rules to "keep her course and speed."

III.

The tug was at fault in that the engines were not stopped immediately upon first hearing the fog signals of the Vance apparently forward of her beam, the position of the schooner not being then known by those on board the tug.

The evidence of the captain of the tug does not correspond exactly with that of the mate of the tug. The captain testified as follows:

Q. Now, when did you first hear the horn, if you heard any, of the "Oceania Vance"?

A. Why, about, I should judge, a minute and a half or two minutes before the collision; possibly a minute and a half.

* * * * * * *

Q. When you first heard the signal of the "Oceania Vance" what did you do?

A. Why, the mate spoke to me. He said there was a sailing vessel. The "Oceania Vance" blew three whistles on a hand horn, and three whistles

indicate that the vessel has the wind abaft the beam, and also three whistles, a long and two short whistles, is a signal allowed by a barge or sailing vessel being towed by a tug, they can make that to show us that they are being towed. I heard the whistle so plainly, and the mate said there was a vessel ahead on the starboard bow, and I said, "Are you sure it is not the barge starting to blow?" and he said, "No, I am quite certain it is ahead; it sounded quite loud," and he answered the whistle right away, and almost immediately she blew another whistle, and then I was satisfied she was right ahead on the starboard bow, and I got into the pilot-house, and the mate stopped her and started to back, and when I got into the pilot-house the bow of the vessel was coming out of the fog ahead and heading directly for us.

Rec., pp. 35, 36.

That this testimony was given understandingly is indicated by his testimony on cross-examination (Rec., p. 50):

A. Why, I was awake when I first heard three whistles on one of these automatic hand horns.

Q. You could tell it was with a hand horn?

A. Oh, yes.

Q. Then what did you do?

A. The mate returned his horn immediately. I had been talking to him a few minutes before. He said it was a sailing vessel blowing three whistles on our starboard bow, and I suggested that it might be the barge we were towing starting to blow three whistles, a long and two short whistles, on the hand horn is rather hard to regulate and one is apt to get one longer than the other. The first whistle we heard sounded like it might be a long with the two a trifle shorter.

Q. Well, what did you do?

A. Why, the mate immediately blew a towing whistle again, and the fellow on the vessel answered almost immediately with three more whistles, and they were very close. I immediately got up and the mate, he stopped the tug and backed.

The mate testified, with respect of the schooner's horn, as follows:

Q. Where did it appear?

A. A little forward of the beam.

Q. Where?

A. On our starboard bow.

Q. And a little forward of the beam?

A. Yes, sir.

Q. Now, could you see at that time the vessel, when you first heard it?

A. No, sir.

Q. When you first heard this fog-horn from the schooner what did you do?

A. I stopped and blowed my whistle and told Captain Lovejoy.

Q. What did you stop?

A. I stopped the engines.

From this condition of the record it is apparent that the testimony of the captain is to be preferred for the reason that while one may forget an incident of an occurrence, one may not remember an incident which did not happen. The captain could not remember the colloquy between himself and the mate unless it had occurred, but it might have occurred and the mate not recall it. We therefore feel jusified in taking it for a fact established by the testimony of the libelant that the engines of the tug were not stopped upon hearing apparently forward of her beam the fog signal of the schooner whose position was not ascertained, but that they were stopped only upon the second signal.

Article 16 of the International Rules (26 Stat. L. 326) provides as follows:

"* * * A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The rule has been construed by the courts in a number of cases. Probably the one most directly in point is that of the "Beaver," 197 Fed. 866, and which was recently affirmed by this court (219 Fed. 134). In that case the steamer "Selja" first heard the fog whistle of the "Beaver" at three o'clock. She continued on her course for five minutes at a speed of six knots, and at 3:05 reduced speed to slow and at 3:10, while making three and a half or four knots, her engine was stopped. At 3:13 the "Beaver" came out of the fog traveling at a speed of about 14 knots and the collision occurred at 3:16. The fault of the "Beaver" was admitted, but it was contended that the "Selja" also was at fault in that she failed to stop her engines when she first heard the fog signals of the "Beaver." This contention was sustained by Judge Bean and in the course of his opinion the court said:

"The respondent claims that rule 16 should be so interpreted that the requirement to stop the engine is not obligatory if the position of the approaching vessel is ascertained 'with reference to danger of collision by an approximate of accuracy';

but this would leave the law substantially the same as it was prior to the adoption of the rule, and would not accomplish the purpose intended by its enactment. It was designed to take away from a vessel the right to proceed at all, after hearing the first signal, without first stopping the engines to enable those in charge to ascertain the position of the signaling vessel. It recognizes the difficulty of ascertaining from the sound of a whistle the exact position, and especially the course and distance of a vessel in a fog. It therefore does not leave the navigation of a vessel, when a whistle is heard apparently forward of her beam, the position of which is not ascertained, to the master's judgment, but assumes that the zone of danger of collision is reached when the whistle is heard, and forbids the ship to enter such a zone except after stopping its engines to ascertain the position of the oncoming ship."

On appeal, this court (219 Fed. 134) calls attention to the fact that the officer in charge of the "Selja" testified that the first whistle of the "Beaver" sounded faint, but distinct, and sounded far off, and that at first he though it might be one of the fog horns off Golden Gate. When asked why he did not stop the engines when he heard the first whistle of the "Beaver" his answer was: "Well, because the sound was located as good as could be located in a fog, and showed absolutely no danger of a collision." The opinion continues:

"But the uncontradicted evidence shows that the Selja's engines were certainly not stopped prior to

3:10—at least 10 minutes after her master had heard the first whistle of the approaching vessel. No amount of argument, no matter how ingenious and clever, can justify a court in ignoring the plain provisions of statute law. Article 16 of the act of Congress entitled 'An act to adopt regulations for preventing collisions at sea' provides, among other things, that:

"'A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'

26 Stat. L. 326.

"That the captain of the Selja did not know the position of the Beaver until she came in sight, only one minute before the collision, is perfectly manifest from his testimony."

The court further said:

"The further contention on the part of the appellant that even if the Selja was in fault in the particulars indicated, such fault was not a contributing cause to the collision, cannot be sustained. As pointed out by the trial court, the law is that, where a vessel has committed a positive breach of a statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so." (Citing cases.)

This court has so recently in the case referred to stated the rule under discussion and the consequence of its violation, that it is not necessary to

quote from any other authority. We, however, refer to the case of the "St. Louis," 98 Fed. 750, and the "Pennsylvania," 19 Wall. 125, as supporting our theory of the case.

From the testimony of Captain Lovejoy of the tug it is apparent that the first signal was heard about a minute and a half before the collision. If the engines of the tug had been stopped at that time and then reversed instead of having been stopped and reversed approximately a minute later, there can be no question but that the collision would have been avoided. At any rate, since the tug violated its statutory duty it is bound to show that that violation could not have contributed to bring about the collision or it must be held to be in fault.

IV.

The tug was negligent on starting back in failing to signal that manoeuver for the information of those in charge of the schooner.

V.

The tug was at fault in that when the engines were stopped they were reversed for a time and then started ahead at full speed.

These two points may be discussed together.

The tug was 107 feet long between perpendiculars. (Rec., p. 40.) In the collision she was struck just abaft the house about 20 feet forward of the stern. (Rec., p. 86.) If she had been struck 12 feet farther back the schooner would have penetrated her water tank and the tug would not have sunk. (Rec., pp. 43-44.)

The mate of the tug, who was in charge when the collision became imminent, testified as follows (Rec., pp. 95-96):

Q. Now, when you saw the schooner first, she was about 200 feet away?

A. About that, yes.

Q. And your idea was by stopping your engine and then reversing the engine, was to avoid her?

A. Yes, sir.

Q. If it had been continually reversed, would it have avoided her?

A. No.

Q. Why not?

A. Because he did not change his course. We could not stop the way of the vessel at the time she would be reached.

Q. Were these proceedings on your part to stop the engines and reverse the engines on the assumption that the captain of the schooner would change the course of his vessel?

A. Certainly.

Q. Based on that?

A. At that time.

Q. If you had known that he was not going to change his course, what would you have done?

A. I certainly would have rung full speed and probably would have cut the hawser to give her a chance to get away.

Captain Scott of the schooner testified (Rec., pp. 145-146:

Q. Did he give any signals indicating that he had reversed his engines?

A. No.

Q. What would be the signal if he had reversed his engines?

A. Three short blasts of the whistle.

Q. If they had given any such signal what would you have done?

A. I would have endeavored to keep ahead of the towboat, and I would have endeavored to put my helm hard aport and tried to come around this way and get ahead of her. I would have known then that she was going astern.

Q. As far as you could judge, as far as you knew, she was coming on ahead?

A. I did not know what he was doing.

No witness pretends this signal was given.

He further testified (Rec., 146-147):

Q. Assuming that she had reversed her engines and then after coming almost to a stop, had signaled full speed ahead, would that action on the part of the steamer have anything to do with causing the collision?

A. Well, evidently it had something to do without his keeping a straight course and according to their testimony that is exactly what they did. Now, had they kept on and not reversed their engines, there would have been no collision.

Q. State why?

A. Because this reversing their engines for a certain length of time, we don't know how long, but it tended to stop the vessel, possibly she was going

astern, I don't know, but had they kept on at full speed ahead, they would have covered two or three or four ship lengths, and she would have cleared us nicely. Suppose they had been stopped, the way through the water had been stopped at the time they saw me, and with the engines going full speed astern, I was clearing them by at least half a ship length. Say this was their vessel and this was me here (showing), I was clearing them by a half a ship length had they kept their vessel going full speed astern, I ought to have cleared them that way.

Q. You would have cleared them if they had kept their vessel going full speed astern?

A. I would have gone ahead.

Q. If they kept their vessel going full speed ahead how would you have cleared them?

A. I would have gone astern.

Q. Across their tow-line?

A. Across their tow-line.

This conclusion is supported by the testimony of the mate of the tug (Rec., p. 82) that when he first saw the schooner (about 200 feet away) (Rec., p. 88). she appeared to be heading about amidships of the tug, and like testimony of the captain of the tug. (Rec., pp. 51, 53.) If the schooner was traveling,

as claimed by libelant, from 7 to 8 knots per hour, and the tug from 4 to 5 miles, and the tug had not been reversed, it would have traveled over 100 feet while the schooner was traveling 200, which would have been enough. The tug was backing 10 or 12 seconds, reducing the speed to about one mile per hour (Rec., p. 51), and yet the tug almost escaped.

The evidence of the captain of the schooner contains also this statement:

Q. Well, when you saw this tow-boat, what did you do then?

A. I did nothing but keep on as I was going.

Q. Why?

A. Because there was nothing to do. I did not know what he was doing. According to the rules of the road I had to keep on.

(Rec., p. 145.)

Let us now consider for a moment the status of the tug and the schooner. It was the duty of the tug to keep out of the way of the sailing vessel. The tug could be stopped and backed and started forward or manoeuvered in any direction, while the mobility of the schooner was limited. The tug was endeavoring to manoeuver so as to avoid the collision. The schooner could not co-operate with it

without knowing what was intended. It had to keep on. If the tug had not reversed its engines but after stopping them had gone ahead full speed, it would have escaped. In the absence of a signal that the engines were reversed, those in charge of the schooner had the right to assume that the tug would go ahead. On the other hand, the mate of the tug believed that if it were backed and the schooner's wheel were put hard aport the danger would be averted and the testimony of the captain of the schooner sustains that theory. Yet, when the engines of the tug were reversed no signal was given to the schooner, so that it could not co-operate with the tug to avoid the accident. It is perfectly apparent that the causes of the collision were the backing and starting of the tug and the failure of the tug to signal its movements.

In the opinion of the lower court the actions of the tug are excused as being taken *in extremis,* while the failure of the schooner to port its helm is condemned. But was the peril of the schooner less imminent than that of the tug? Are its actions to be condemned as if there were ample time to govern them, while the blunders of the tug are to be excused though done with equal time for deliberation? The schooner could not do otherwise than it did do because of lack of information as to what would be done by the tug. For that lack of information those

in charge of the tug were responsible, since they violated their legal duty to warn the schooner of any departure from its regular course. The tug needed to go but 12 feet farther to have avoided serious injury, or 20 feet farther to have escaped the contact. If it had not reversed its engines it would easily have made this distance. If it had backed and the schooner's helm had been put hard aport it is probable that no accident would have occurred. This action was prevented by the tug's own negligence. Upon it, therefore, must rest the responsibility for the collision and for the damage which appellee sustained.

Respectfully submitted,

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